

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Keiva C. Wyatt,

Appellant,

v.

Case No. 08-ABL-06-0247

Department of Rehabilitation and Correction,
Madison Correctional Institution,

Appellee.

ORDER

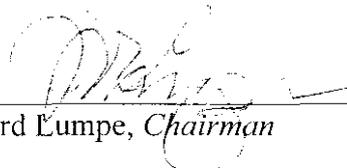
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's abolishment of Appellant's position be **AFFIRMED**, pursuant to O.R.C. §§ 124.321 to 124.328.

Lumpe - Aye
Sfalcin - Aye
Tillery - Aye



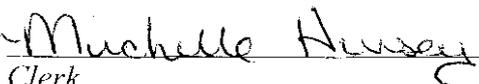


J. Richard Lumpe, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute (the original/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, November 9, 2009.



Michelle Hussey
Clerk

NOTE: Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

11-9-09

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Keiva C. Wyatt,

Case No. 08-ABL-06-0247

Appellant

v.

September 17, 2009

Department of Rehabilitation and Correction,
Madison Correctional Institution

Appellee

Marcie M. Scholl
Elaine K. Stevenson
Administrative Law Judges

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration upon Appellant Wyatt's timely filing of an appeal of the abolishment of her position. A record hearing in this matter was held on December 1 through December 3, 2008. Appellant Wyatt was present at record hearing and appeared *pro se*. Appellee Department of Rehabilitation and Correction was present through its designee, Human Resources Legal Counsel Amy C. Parmi, and was represented by Assistant Attorneys General Pooja A. Bird and Nicole S. Moss.

This Board's jurisdiction to hear this appeal was established pursuant to R.C. 124.03(A) and R.C. 124.328.

STATEMENT OF THE CASE

Appellee's first witness was Kevin Stockdale who testified he is presently employed by Appellee as Chief of Budget Planning and Analysis, and has held that position for approximately three months. He indicated that prior to accepting his present position, he was employed by the Office of Budget Management (OBM) as a Budget Management Analyst for approximately one year; in that position he was responsible for working with assigned agencies to prepare and monitor budgets. The witness noted that he worked with Appellee, Department of Youth Services and

the Department of Public Safety to prepare budgets and budget requests for the 2008-2009 budget cycle.

The witness recalled that on January 31, 2008, Governor Ted Strickland issued an Executive Order (Appellee's Exhibit 1), requiring state agencies receiving general revenue funds (GRF) to reduce their expenditures in order to close a budget deficit. Mr. Stockdale indicated that agencies were required to take a number of actions to reduce their budgets and that some agencies, such as Appellee, were required to reduce their payrolls, as payroll costs are generally the largest component of agency budgets. He explained that payroll costs include employees' base pay, along with additional costs, such as fringe benefits and step increases.

Mr. Stockdale recalled that his role as a Budget Management Analyst was to provide Appellee with guidelines regarding budget reductions; he noted that Appellee was required to cut its budget by six to ten percent. The witness stated he reviewed the plan submitted by Appellee to OBM for viability and impact, and submitted a report to his supervisor. He noted that Appellee was somewhat restricted in what it could and could not cut from its budget stating, for instance, that Appellee could not cut food service, and indicated that they discussed several alternatives.

The witness testified that Appellee's initial budget reduction plan was rejected by OBM. Mr. Stockdale indicated he worked with Appellee and OBM's Director provided Appellee with guidelines for budget reduction (Appellee's Exhibit 11, Book 3) to prepare a revised plan that implemented OBM's agency budget directives. He stated that the budget reduction plan submitted by Appellee and approved by OBM encompassed a total budget reduction of \$71.7M, which included a reduction in payroll of \$52M and affected institutional and administrative operations agency-wide.

Appellee's next witness was Douglas Forbes. He has been employed by Appellee as Deputy Director of Administration for approximately three years and supervises approximately two hundred employees in that position. He indicated he is responsible for Appellee's budget and supervises approximately seven employees who work on that budget. The witness confirmed that he prepares Appellee's biennial budget and prepares budget allocation plans for each year. Mr. Forbes explained that Appellee has three funding sources: General Revenue

Funds (GRF), which comprise approximately eighty-five percent of Appellee's funding; Prisoner Program Funds; and OPI Funds.

Mr. Forbes explained that OPI (Ohio Penal Industries) makes items such as license plates, furniture, and clothing, and has its own budget; OPI is funded through customer sales to state agencies and local government agencies. He noted that OPI funds pay entirely for commissary staff salaries and no GRF funds are used. The witness observed that OPI sales decreased from \$3M to \$1M, and explained that Appellee purchases approximately eighty-five percent of the products OPI manufactures.

Mr. Forbes confirmed that he participated with the other Deputy Directors in the overall budget reduction planning process, but did not determine which positions should be cut at each institution. He recalled that Appellee saved approximately \$39M in payroll expenses and was able to save more than \$9M in areas other than payroll, such as reductions in ancillary services, lease agreements, and travel expenses, but still fell short of its \$71M goal. The witness observed that Appellee had also begun offering an Early Retirement Incentive in May of 2007 for approximately 1,400 eligible positions but, to date, only two hundred sixty employees had taken advantage of the incentive.

Mr. Forbes confirmed that payroll expenditures are Appellee's largest expense. He indicated that seven hundred and one positions were abolished, which included one hundred sixty-two positions that were vacant at the time of abolishment. Mr. Forbes stated that, in his opinion, Appellee had to cut positions in order to realize the necessary amount of savings mandated by the Governor's order to reduce the budget. He noted that Appellee looked to positions other than security and medical staffing when determining which positions should be abolished but, to his knowledge, no guidelines were provided to wardens.

Upon cross examination Mr. Forbes stated he was not sure if vacancies were included in the seven hundred and one figure that he gave with respect to the number of abolishments. He explained that he is aware that some vacancies do still exist as some of those are going to be filled.

Appellee's next witness was David Burrus. He was employed by Appellee for approximately twenty-seven years and retired from the position of Labor Relations Administrator in September 2008. In that position he administered three collective

bargaining agreements and oversaw the disciplinary process for union employees. The witness confirmed that he was familiar with and participated in the abolishment process; he oversaw the abolishment process for both union and exempt employees that resulted in the June 2008 layoffs.

Mr. Burrus stated that the directors and assistant directors made the decision that job abolishments were necessary, and observed that the abolishments affected all of Appellee's institutions. He explained that in Central Office and the Division of Parole and Community Services, the Deputy Director with oversight for each specific area made the determination as to which positions would be abolished. The witness recalled that Director Terry Collins notified each Warden or Regional Director of the number of positions to be eliminated at their facilities, and the Wardens and Regional Directors used their discretion to select specific positions, based upon their facilities' operational needs. He confirmed that Wardens were repeatedly counseled to choose positions for abolishment, rather than people.

Mr. Burrus stated that Appellee took additional efforts to reduce the agency's budget, including offering an Early Retirement Incentive program, consolidating some programs, and reviewing contractual obligations. He testified that one unclassified Deputy Warden position at each institution was eliminated, as well as other unclassified positions within Central Office and the Division of Parole & Community Services. The witness noted that some affected unclassified employees exercised their fallback rights to classified positions.

Mr. Burrus confirmed that unclassified position eliminations were implemented prior to the job abolishment of exempt positions because of the issue of fallback rights. He explained that when an unclassified employee exercises his or her fallback rights it is sometimes necessary to create a position for them to "fall back" into; the witness noted that this can lead to duplicative positions in some institutions, and when a job abolishment is undertaken, typically the most recently created duplicative position is the position eliminated. Mr. Burrus acknowledged that this practice sometimes resulted in a formerly unclassified employee being placed into a classified position and then laid off from that position shortly thereafter, but indicated that Appellee was legally required to proceed in that manner.

Mr. Burrus indicated that once the positions to be abolished had been identified, it was necessary for Appellee to identify the layoff jurisdiction for each position and calculate retention points for each of the incumbent employees. He

noted that retention point lists were posted in several locations and any alleged errors were checked by referring to information contained on the OAKS system; DAS also certified Appellee's calculations. The witness explained that retention points are calculated based on years of continuous service, with no break in service. He confirmed that prior service was also considered in the calculation of retention points, but that DAS would not consider the issue of an error in awarding prior service credit unless it was raised prior to or at the same time that the layoff rationale was submitted. Mr. Burrus testified that an employee may only challenge the calculation of his or her own retention points.

Mr. Burrus stated that once DAS had certified Appellee's retention point calculations, the next step was to determine how each of the affected employees would be impacted by the displacement process; a notification letter was sent to employees (Appellee's Exhibit 4B). He noted that an exempt employee could displace into a vacant bargaining unit position in their classification, but that employees already in the bargaining unit whose positions were abolished would take priority in filling those vacancies. The witness recalled that employees were also notified of some vacancies that would be filled, and were given the option of applying for those positions or for Corrections Officers openings.

The general rationale for the job abolishments and subsequent layoffs was for reasons of economy, which resulted from the projected budget shortfall. Mr. Burrus noted that a separate rationale was prepared for each abolished position, showing how the position's duties would be absorbed.

Upon cross examination Mr. Burrus explained that the Wardens were given a number of positions to be cut and they were told to be fair to both exempt and bargaining unit positions, while keeping in mind the mission and goal of the institution. He testified he did not review the rationales of each Warden.

Appellee's next witness, Chris Lambert, testified he is presently employed by Appellee as a Labor Relations Officer 3 and is responsible for working with labor unions regarding the grievance process, arbitration and mediation. He confirmed that he was assigned to write the general rationale for the June 2008 job abolishments and subsequent layoffs and indicated he reviewed examples of past abolishments and layoffs, and discussed specific issues with other staff members in preparing the rationale. The witness noted he reviewed materials from OBM and met with Deputy Directors to learn how budget cuts would be made. Mr. Lambert

stated that individual rationales for each position were created by the Warden of the institution at which the position was located.

Mr. Lambert recalled that Appellee did not have the option of closing institutions, due to an increase in inmate populations, and that the Director specified that no abolishments or layoffs should be made with regard to security and medical staff or parole officers. He observed that it was the Director's goal to preserve Appellee's core functions of security, medical services, parole services and education for rehabilitation.

The witness stated that the only basis for the job abolishments was the budget shortfall. He noted that the rationale addressed commissary staffing issues, the reduction of personal service contracts, and the increase in inmate population. Mr. Lambert testified that he was not involved in any determination as to which positions should be abolished.

Upon cross examination Mr. Lambert testified he did review the Department of Administrative Services' manual regarding abolishments. He also stated he reviewed the position descriptions to ensure that there was a position description that fit the abolished position. In some cases, he reviewed how the duties were going to be distributed.

Appellee's next witness, Rhonda Pickens, testified she is presently employed by the Department of Administrative Services as a Human Resources Analyst 2 and stated she is responsible for verifying retention points for agencies seeking to abolish positions. She indicated she works specifically with Appellee, the Department of Youth Services, the Rehabilitation Services Commission, the Department of Tax and other smaller agencies. The witness noted that the manner in which retention points are accrued and calculated is outlined by the Ohio Administrative Code. She observed that retention points are not accrued in certain situations, such as while an employee is on disability leave.

Ms. Pickens explained that continuous service means that an employee has had no more than a thirty-day break in service. She indicated that accrual of retention points starts over if an employee has a break in service. The witness noted that it is the agency's obligation to provide information regarding an employee's prior service to DAS, although agencies argue that it is onerous for

employees to provide information regarding their prior service. She observed that prior service also affects the calculation of employees' vacation and sick leave.

The witness stated that DAS has to have a cut-off date for the submission of information regarding prior service credit in order to keep the abolishment and layoff process on track and that information must be submitted prior to the submission of the rationale. She indicated that an employee can only challenge his or her own retention point calculation.

Appellee's next witness was Brian Cook. He testified he is presently employed by Appellee as Warden of the Madison Correctional Institution (MCI) and noted that he has been with the Department of Rehabilitation and Correction for approximately twenty years. He stated that MCI employs approximately 500 staff.

Warden Cook stated he was advised of budget cuts that needed to be made and instructed to select fifteen to eighteen positions to be abolished. He recalled that he discussed the cuts to be made with his supervisor, Regional Director Ernie Moore, and that ultimately twenty positions at MCI were abolished. The witness confirmed that he was given the discretion to select the positions to be abolished, but was advised that some areas, such as OPI staff, Corrections Officers and medical staff were off-limits.

Warden Cook stated that he made the decision to abolish the Labor Relations Officer 2 (LRO 2) position, occupied by Appellant Wyatt, and indicated the duties previously performed by Appellant Wyatt were assigned to other existing employees. He stated his institution had a low amount of grievances, so he felt the LRO 2 position was a position to abolish, also taking into consideration that the position had no direct contact with inmates. The witness testified that MCI's operations have not suffered as a result of the abolishment of the LRO 2 position. He testified other employees from other institutions have come to do some hearings, but only to ensure neutrality.

On cross examination Warden Cook stated he worked at London Correctional for six years and his experience was that there were over ten grievances a month there. He also stated that comparing London and MCI is like comparing apples to oranges. Warden Cook testified that he referred to the position descriptions and his own knowledge of positions when he completed the rationales. He confirmed that Appellant Wyatt had recently been promoted to her

position of LRO 2, as he promoted her into that position. He testified that conducting pre-disciplinary hearings is not part of the position description for a LRO 2 but he listed it on the rationale as prior to Appellant Wyatt occupying the position, the former LRO 2 did do those hearings.

Appellant Wyatt testified she is presently employed by Appellee as a LRO 2 at FPRC. She stated it is her belief that Warden Cook did not substantially comply with the provisions of R.C. 124.341 in implementing the abolishment of her LRO 2 position. Appellant Wyatt noted that the individual rationale for her position did not clearly list all of the duties she performed or how those duties were going to be distributed.

Appellant Wyatt indicated that the current LRO 2 at MCI (Melody Haskins, Wardens Assistant 2) has an assistant to assist her in her duties. She stated Jeffrey Willbarger was assigned the responsibility of conducting pre-disciplinary hearings which were previously part of Appellant's job duties. She also stated that Mr. Willbarger is doing arbitration cases although he was not listed as picking up that duty. Appellant Wyatt testified she used to do arbitrations and mediations.

FINDINGS OF FACT

Based on the testimony presented and evidence admitted at record hearing, and the entirety of the information contained in the record, I make the following findings of fact:

The parties stipulated that Appellee complied with the relevant procedural and notice requirements of the Ohio Revised Code and Ohio Administrative Code in implementing the abolishment of Appellant Wyatt's position.

On January 31, 2008, The Governor of Ohio issued Executive Order 2008-10S, which instructed state agencies to implement General Revenue Fund (GRF) spending reductions within their agencies due to an impending state budget shortfall. The Governor also instructed the Office of Budget and Management (OBM) to issue directives to guide agencies in implementing GRF spending reductions.

Appellee took steps to reduce the agency's budget, including offering an Early Retirement Incentive program, consolidating some programs, and reviewing contractual obligations.

Payroll expenditures are Appellee's largest expense and Appellee determined that it had to abolish positions in order to realize the necessary amounts of savings mandated by the Governor's order to reduce the budget.

The Director of the Department of Rehabilitation and Correction, Terry Collins, notified each Warden or Regional Director of the number of positions to be eliminated at their respective facilities. The Wardens and Regional Directors used their discretion to select specific positions, based upon their facilities' operational needs.

On April 8, 2008, Appellee submitted its rationale for job abolishments to the Ohio Department of Administrative Services (ODAS). Appellee's rationale contained the agency's budget information, general cost savings measures, and the proposed abolishment of several hundred positions to save salary and benefits. Appellee's rationale contained several tables that outlined projected GRF savings based upon staff reductions and other cost savings measures.

Appellee calculated retention points for those employees affected by the abolishment and resultant layoffs. ODAS verified Appellee's calculation of retention points for all affected employees and authorized Appellee to proceed with the layoffs that resulted from the abolishment of positions.

In June 2008, Appellant Wyatt held a position classified as Labor Relations Officer 2 at Madison Correctional Institution. On June 3, 2008, Appellant Wyatt was notified that her position was to be abolished effective June 22, 2008.

Appellant Wyatt exercised her displacement rights and, as a result, displaced into a Labor Relations Officer 2 position at Franklin Pre-Release Center effective June 22, 2008.

CONCLUSIONS OF LAW

In the present appeal the Board must consider: (1) Whether Appellee has proven by a preponderance of the evidence that the abolishment of the position encumbered by Appellant Wyatt was for reasons of economy and was effectuated in accordance with sections 124.321 to 124.327 of the Ohio Revised Code and the rules of the Ohio Administrative Code Chapter 123:1-41 *et seq.*, and (2) whether Appellant Wyatt's displacement rights were effectuated in accordance with sections 124.321 to 124.327 of the Ohio Revised Code and the rules of Ohio Administrative Code Chapter 123:1-41 *et seq.*

Section 124.321 of the Ohio Revised Code governs the abolishment of positions. It states, in pertinent part:

(D)(1) Employees may be laid off as a result of abolishment of positions. As used in this division, "abolishment" means the deletion of a position or positions from the organization or structure of an appointing authority.

For purposes of this division, an appointing authority may abolish positions for any one or any combination of the following reasons: as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or for lack of work.

(2)(a) Reasons of economy permitting an appointing authority to abolish a position and to lay off the holder of that position under this division shall be determined at the time the appointing authority proposes to abolish the position. The reasons of economy shall be based on the appointing authority's estimated amount of savings with respect to salary, benefits, and other matters associated with the abolishment of the positions only, if:

(i) Either the appointing authority's operating appropriation has been reduced by an executive or legislative action, or the appoint authority has a current or projected deficiency in funding to maintain current or projected levels of staffing and operations; and

- (ii) In the case of a position in the service of the state, it files a notice of the position's abolishment with the director of administrative services within one year of the occurrence of the applicable circumstance described in division (D)(2)(a)(i) of this section.

(b) The following principles apply when circumstance described in division (D)(2)(a)(i) of this section would serve to authorize an appointing authority to abolish a position and to lay off the holder of the position under this division based on the appointing authority's estimated amount of savings with respect to salary and benefits only:

- (i) The position's abolishment shall be done in good faith and not as a subterfuge for discipline.
- (ii) If a circumstance affects a specific program only, the appointing authority only may abolish a position within that program.
- (iii) If a circumstance does not affect a specific program only, the appointing authority may identify a position that it considers appropriate for abolishment based on the reasons of economy.

(3) Each appointing authority shall determine itself whether any position should be abolished. An appointing authority abolishing any position in the service of the state shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of abolishment.

If an abolishment results in a reduction of the work force, the appointing authority shall follow the procedures for laying off employees, subject to the following modifications:

- (a) The employee whose position has been abolished shall have the right to fill an available vacancy within the employee's classification.
- (b) If the employee whose position has been abolished has more retention points than any other employee serving in the same

classification, the employee with the fewest retention points shall be displaced.

- (c) If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall have the right to fill an available vacancy in a lower classification in the classification series.
- (d) If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall displace the employee with the fewest retention points in the next or successively lower classification in the classification series.

* * *

Appellee has met its burden of proving by a preponderance of the evidence that Appellant Wyatt's abolishment was due to reasons of economy and that all procedural requirements of effectuating such abolishment were satisfied. Prior to the record hearing, Appellant Wyatt stipulated that Appellee complied with the relevant procedural and notice requirements of the Ohio Revised Code and Ohio Administrative Code in implementing the abolishment of her position. The evidence established that on January 31, 2008, the Governor issued an Executive Order requiring agencies, Appellee included, to reduce their GRF expenditures. Specifically, Appellee was ordered by OBM to cut their expenditures by six to ten percent. The evidence also established that approximately eighty-five percent of Appellee's budget is made up of GRF funding.

Section 124.321(2)(a) of the Ohio Revised Code allows an appointing authority to abolish positions based on the estimated savings of an employee's salary and benefits if the appointing authority's operating appropriation has a projected deficiency or if the appropriation has been reduced by executive action. Appellee proved that both of those are true. Appellant Wyatt offered no evidence to dispute either of those facts. Appellee had a budget deficit and was ordered by executive action to reduce their expenditures. Appellee abolished 701 positions in order to reduce its expenditures. The statute provides that the savings in salary and

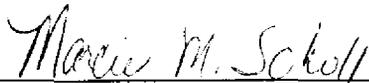
benefits can be the basis for an abolishment due to economy if the abolishment takes place within one year of such executive action and projected deficit. In the instant case, the Executive Order was issued in January 2008 and the abolishment of Appellant Wyatt's position took place in June 2008. The appointing authority has the discretion to decide, based on operational needs, which positions to abolish.

Appellant Wyatt's primary argument at record hearing was that Warden Cook's written rationale for selecting her position as one for abolishment did not clearly list her job duties and how those duties were to be distributed after her position was abolished. There is no requirement that all duties of an abolished position must be redistributed. Sometimes it is determined that duties are no longer needed, so those duties are not distributed. There is also no requirement to list every single duty and who those duties are going to be assigned to. If Appellee had abolished Appellant Wyatt's position due to a reorganization for efficiency, then facts such as those may be pertinent, but in an abolishment due to lack of funds, the only pertinent facts are those that relate to if there was or not a lack of funds within Appellee and as already has been stated, Appellee has met their burden with respect to that question.

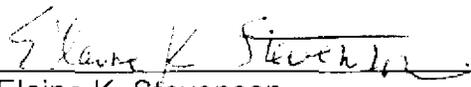
Appellant Wyatt also argued she believed the real reason for the abolishment to be a lack of work and Appellee did not provide a rationale for that reason. That is because Appellee did not abolish Appellant Wyatt's position due to a lack of work. As can be seen from reading the above statutes, an appointing authority has the authority to decide if abolishments are needed and the reason for those abolishments. Once again, Appellee proved that the abolishments were done for the reasons of economy and having done so, there is no requirement for Appellee to establish why an abolishment was not done for a different reason. Appellant Wyatt has not presented any evidence to show that there was any bad faith on the part of the Appellee in abolishing her position.

Inasmuch as Appellee has met its burden of proof and Appellant Wyatt did not prove any bad faith with regard to Appellee's actions, it is our **RECOMMENDATION** that Appellant Wyatt's abolishment be **AFFIRMED**, pursuant to sections 124.321 to 124.328 of the Ohio Revised Code.

Keiva C. Wyatt
Case No. 08-ABL-06-0247
Page 14



Marcie M. Scholl
Administrative Law Judge



Elaine K. Stevenson
Hearing Officer

MMS:mlh